IN THE

Supreme Court of the United States

October Term, 1942

No. 201

AMERICAN MEDICAL ASSOCIATION, a Corporation, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

No. 202

THE MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA, A CORPORATION, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONERS

EDWARD M. BURKE,
WILLIAM E. LEAHY,
SETH W. RICHARDSON,
CHARLES S. BAKER,
WARREN E. MAGEE,
Attorneys for Petitioners.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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OPINIONS BELOW.

The District Court sustained a demurrer to the indictment, *United States* v. *American Medical Ass'n*, 28 F. Supp. 752. The Court of Appeals reversed, *United States* v. *American Medical Ass'n*, 72 App. D. C. 12, 110, F. 2d 703.

A trial was had in the District Court and all of the defendants, except American Medical Association [1] and Medical Society of the District of Columbia [2] were found not guilty. The jury found the petitioners guilty, and there were judgments on the verdict. The Court of Appeals affirmed, *American Medical Ass'n.* v. *United States*, — App. D. C. —, 130 F. 2d 233.

JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938), 28 U. S. C. 347.

QUESTIONS PRESENTED [3]

1. Whether the practice of medicine and the rendering of medical services as described in the indictment are "trade" under Sec. 3 of the Sherman Act.

2. Whether the indictment charged or the evidence proved "restraints of trade" under Sec. 3 of the Sherman Act.

3. Whether a dispute concerning terms and conditions of employment under the Clayton and Norris-La Guardia Acts was involved, and, if so, whether petitioners were interested therein, and therefore immune from prosecution under the Sherman Act.

STATUTES INVOLVED.

The statutes involved are Sec. 3 of the Sherman Act, Secs. 1, 6 and 20 of the Clayton Act, and Secs. 4, 5, 6, 8 and 13 of the Norris-La Guardia Act.[4]

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[1] Hereinafter referred to as AMA.

[2] Hereinafter referred to as DMS.

[3] The "questions presented" were limited by the writs of certiorari.

[4] The statutes involved are contained in the appendix hereto, pp. 62-66, *infra*.

STATEMENT.

The indictment charges (R. 14, 15) petitioners with engaging in a conspiracy:

> (1) To restrain Group Health Association, Inc.,[5] a corporation, in furnishing through monthly salaried full-time employee-doctors, medical care to its members and their dependents;
>
> (2) To restrain members of GHA in obtaining such medical care;
>
> (3) To restrain GHA doctors;
>
> (4) To restrain other doctors in the pursuit of their callings; and
>
> (5) To restrain the Washington hospitals.

Petitioners contend that the indictment did not charge nor the proof show an offense under the Sherman Act for three basic reasons, any one of which is fatal to this prosecution.

First: because the activities alleged to have been restrained were not commercial, and hence not trade and commerce within the meaning of Sec. 3 of the Sherman Act.

Second: because the indictment does not charge, nor the proof show, that the alleged restraints fixed prices or suppressed competition to the extent that market prices were substantially affected, to the injury of the public.

Third: because the alleged restraints arose out of a controversy or dispute concerning terms and conditions of employment of doctors, which, if doctors are tradesmen, was within the excluding purview of the Clayton and Norris-La Guardia Acts.

This case presents a controversy concerning terms and conditions of employment of doctors in the medical profession. AMA, the national organization, DMS, the local organization, and the doctors who are members of those or-

[5] Hereinafter referred to as GHA.

ganizations have long observed and followed a code of professional ethics (R. 1108). That code has been supplemented by association rules and regulations (R. 1108) initiated by and agreed to by the members themselves and made, by them, a necessary condition of membership in their medical organizations.

GHA sought to engage in the practice of medicine by the device of opening a clinic, including offices for a staff of doctors (R. 368), whom it employed by the month, on a full-time salary basis. That arrangement, it was generally believed by petitioners (R. 340, 373), as well as by the law enforcement authorities of the District (R. 373), was illegal.

GHA was incorporated on February 24, 1937, under a non-commercial statute of the District of Columbia.[6] GHA opened its clinic on November 1, 1937. It immediately ran afoul of the law-enforcement officers of the United States and the District of Columbia and Congress.

The respondent, acting through the United States Attorney, after inquiring into GHA's scheme, on January 15, 1938, notified GHA that unless it ceased operations immediately and wound up its affairs, respondent would enjoin GHA and cause its involuntary dissolution, because GHA was illegally engaged in the practice of medicine and illegally engaged in an insurance business (Petitioners' offer of proof, R. 1424).

The District of Columbia, acting through its Corporation Counsel and Insurance Commissioner, after inquiring into GHA's scheme, on January 15, 1938, notified GHA that it was improperly incorporated and was illegally engaged in the insurance business, and unless GHA complied with the law, injunctive and other legal proceedings would be

[6] The Benevolent Corporations Act of March 3, 1901, C. 851 (31 Stat. 1283); Act of June 30, 1902, C. 1329 (32 Stat. 533); D. C. Code 1940, Title 29, Secs. 29-601 to 29-605.

brought to end GHA's illegal operations (Petitioners' offer of proof, R. 1424).

GHA received $40,000 from Home Owners Loan Corporation [6a] ostensibly for medical services to be rendered to it (R. 375, 467; Petitioners' offer of proof, R. 1387-1388). When news of this arrangement "leaked out", a Congressional investigation started (R. 467). Senator McCarran requested that the Comptroller General investigate this unauthorized use of federal funds (Petitioners' offer of proof, R. 911).

The Comptroller General investigated GHA and was furnished the facts concerning GHA and its acquisition of $40,000 of public money and other Government property. The Comptroller General rendered to the Senate his formal opinion, which was made public, showing that GHA was using Government property and discounts, had received $37,357.65 from funds of the United States without complying with its contract and without providing the services agreed upon, that GHA also had set up at HOLC an unlawful assignment of wages or "check-off" system (R. 376-378) whereunder dues were deducted from the salaries of HOLC employees (R. 918, 919) and that the payments of federal funds by HOLC to GHA were made and incurred without authority of law (Petitioners' offer of proof, R. 915-920).

Congress itself investigated GHA's activities and its contract with HOLC (R. 467, 468) and the Committee on Appropriations of the House of Representatives reported to Congress that it was unanimously of the opinion that the $40,000 contribution of HOLC to GHA was not authorized by law (Petitioners' offer of proof, R. 1420).

GHA was subsidized by the Twentieth Century Fund (R. 375) and other private funds (Petitioners' offer of proof, R. 1011, 1013-1025) and was advertising for and soliciting members and coercing federal employees to become members (Petitioners' offer of proof. R. 940).

[6a] Hereinafter referred to as HOLC.

All of the foregoing facts were known to petitioners and their members, and entered into and were parts of the controversy over employment existing between GHA, petitioners, their members and the hospitals.

Although many doctors who were not members of the petitioners were available to GHA, that corporation, despite full knowledge of the principles of ethics and rules and regulations governing the professional activities of petitioners' members, willfully sought to induce certain doctors who were members of petitioners, to ignore and violate their medical society obligations and accept employment on the GHA hired staff.

Apprehensive of impending controversy, members of DMS immediately sought both by individual and group conferences (R. 290-309, 176-199) to persuade GHA, in its employment of doctors who were medical society members, to make some effort to conform to the principles of ethics, and the employment rules and regulations of DMS (R. 160, 174). These overtures were flatly rejected by GHA (R. 201) and it persisted in endeavoring to proselyte petitioners' members, to induce them to ignore medical association rules, and to create controversies between such members and petitioners. The controversy here involved followed. To acquaint its members with the facts, the AMA published in its Journal an article that was critical of GHA (R. 368-386). GHA employed two doctors who were members of DMS (R. 197). DMS had a provision in its constitution that any of its members accepting contracts of employment must submit such contracts for approval to a committee of DMS (R. 1265, 1266). The two doctors hired by GHA, under the urging of GHA, refused to do so (R. 197), and after a full hearing (R. 165, 197), one of them was expelled from DMS (R. 561).

The Government contended that petitioners intended to restrain GHA and its employee-doctors and members. Petitioners assert that they intended only to preserve, protect, and defend their medical societies, their principles of ethics, rules and regulations, from impairment and destruction, and to perpetuate free and fair competition between their members as required by their principles of ethics (R. 860).

Petitioners were also charged with restraining the Washington hospitals. In 1934, AMA adopted the Mundt Resolution [7] (R. 779) which was thereafter transmitted to intern and resident hospitals. Several of the local hospitals already had such a rule (R. 638, 639, 1338). No hospital was ever required as a condition of approval, to confine its staff to society members (R. 1336, 1337). An inspection of local hospitals, had in the summer of 1937, far from being a part of an aim to restrain GHA, was, under the uncontradicted evidence, solicited by the hospitals (R. 781, 782, 869) and carried out on behalf of AMA by persons who had no knowledge (R. 785, 787, 870, 881) of the existence of GHA.

Obviously, membership in the medical societies aided and advanced the general professional welfare of members, and, as conceded in the indictment, became of importance and value to conforming members. GHA, while insisting upon the right of its employed doctors to retain medical society membership, nevertheless proposed that observance of medical society codes, rules and regulations could be ignored, at the will of a particular member, without loss of society membership and that any attempt on the part

[7] Resolved that it is the opinion of the House of Delegates of the American Medical Association that physicians on the staffs of hospitals approved for intern training by the Council on Medical Education and Hospitals be limited to members in good standing of their local county medical societies and that the House of Delegates requests the Council on Medical Education and Hospitals to take this under advisement.

of the society to require conformance with such rules operated as an illegal restraint of the medical society member as well as of his employer, GHA and its lay members.

The controversy threatened the continued welfare and existence of petitioners and made everything relating to GHA's terms and conditions of employing petitioners' members, of interest to petitioners, particularly insofar as petitioners' codes, rules and regulations might be violated. If GHA was operating in violation of Federal statutes and its activities presented an illegal, unethical, or unprofessional operation, if it was engaged in questionable practices inimicable to the best interests of either the public, the medical profession, the petitioners or their members, then petitioners owed its members, to say nothing of the public, the duty of opposing, avoiding and preventing injury to petitioners, and their members, through the proselyting tactics of GHA. The court below said physicians may organize, establish standards of professional conduct and effect agreements for self-discipline and control, but in the same breath said that if such standards and agreements are enforced and some other professional or business group is injured the Sherman Act is violated.

As the hospitals might well be considered the workshop of physicians, legitimate persuasion and reasoned argument might lawfully be directed toward the hospitals, recommending preference to organization members whose codes, rules and regulations were known and established, as against others not so well recommended. That could not possibly amount to criminal restraint of GHA under the Sherman Act. The court below said petitioners might use legitimate persuasion and reasoned argument as a means of winning public sentiment to their point of view but in the same breath said that when they so persuade and

argue with the hospitals or when petitioners' members persuade and argue among themselves, they violate the Sherman Act.

Out of this controversy came the indictment wherein 21 doctors and four medical associations were indicted (R. 1-21). A demurrer to the indictment (R. 21-24), particularly upon the ground of inapplicability of the Sherman Act, was sustained by the District Court (R. 24, 25). The Court of Appeals reversed, holding that the Act was a broad remedial statute, intended to protect all individuals in all occupations, professional or commercial, and any restraint upon an individual is prohibited by the Act. The opinion did not even contend the indictment charged that prices were fixed or that competition was suppressed to the extent that market prices were substantially affected. The case thereafter was tried upon the law laid down by the Court of Appeals. Upon the trial, two individual defendants and two defendant associations were discharged by directed verdict (R. 38). At the close of all the evidence, motions to direct verdicts for *each* defendant as to the charge of restraint of *each* of the five activities described in the indictment, were made and denied (R. 1453-1455) and defendants excepted. The court instructed the jury that defendants could be convicted if a conspiracy did in fact exist to restrain trade in the District in at least one of the several ways alleged (R. 1508) i. e., any one of the five activities alleged in the indictment to have been restrained. Of the remaining defendants, all the individual defendants were acquitted, and only the corporate petitioners were convicted. After verdict petitioners moved the court to disregard all the evidence pertaining to the acts and doings of the individual defendants found "not guilty" and to enter a judgment for the corporate petitioners notwithstanding the verdict (R. 1517), and also

moved the court in arrest of judgment (R. 1518) and for a new trial (R. 1519). These motions were denied (R. 1525), judgments were entered on the verdict (R. 1525, 1526), and fines imposed (R. 1525, 1526). On appeal the Court of Appeals affirmed. This Court granted certiorari limiting the writs to the "questions presented" herein.

The evidence is voluminous, but on the questions presented here certain statements of ultimate fact can fairly be made.

1. The evidence showed that the activities claimed to have been restrained were the practice of medicine and the rendering of medical services.

2. The evidence which the Government contends showed that petitioners conspired to "restrain" trade was as follows:[8]

Evidence that petitioners thought that the plan of GHA was in violation of law and of the Principles of Medical Ethics of AMA and DMS and therefore "unlawful" and "unethical."

Evidence which the Government says tended to show that petitioners were opposed to GHA and that such opposition was inspired by a fear that GHA would attract a substantial number of Government employees who were actual or potential patients of petitioners' members with a resulting reduction in the income of petitioners' members.

Evidence which the Government says shows a plan to force GHA out of business. The Government says the plan consisted of:

> (a) Action by DMS forbidding its members to join the medical staff of GHA or to consult with members of the staff. (It is important to observe that DMS, long before the incorporation of GHA, had a provi-

[8] This is taken from the brief of the United States, pp. 8-15, in opposition to the granting of certiorari herein.

sion in its Constitution that required its members to submit for approval any contract which they might contemplate entering into, for the rendering of medical services, other than the usual patient and doctor relationship) (R. 1265, 1266).

(b) The institution by a committee of DMS, before the Executive Committee of DMS, of disciplinary proceedings, against two members of DMS who violated the provisions of the DMS Constitution. (The two members of DMS, at the instigation of GHA, declined to submit to DMS, for approval their contract of employment by GHA. DMS had no alternative but to institute such disciplinary proceedings unless they were to abandon their Constitution.)

(c) The coercion of the Washington hospitals to exclude GHA doctors from the staffs of the hospitals and thus to prevent these doctors from treating their GHA patients in the hospitals. (This contention is based on the resolution of December 1, 1937, of DMS [9] which was sent to the hospitals.)

3. The evidence showed a dispute was involved between petitioners and GHA, its officers, agents and doctors, concerning terms and conditions of employment of doctors by GHA.

SPECIFICATION OF ERRORS TO BE URGED.

The court below erred: (1) In reversing the judgment of the District Court sustaining petitioners' demurrer to the indictment; (2) In holding the indictment charged a

[9] Resolved, that as a matter of educational policy the Medical Society of the District of Columbia strongly recommends that all hospitals engaged in the teaching and training of residents, interns, and nurses, where possible, follow the recommendations of the American Medical Association regarding the constitution of their entire medical staffs, namely, that each appointee be a member of the Medical Society of the District of Columbia or a local Medical Society in his immediate neighborhood and a member of the American Medical Association.

violation of Sec. 3 of the Sherman Act; (3) In holding the indictment was not insufficient; (4) In affirming (on the second appeal) petitioners' convictions; (5) In construing Sec. 3 of the Sherman Act as applying to and forbidding the acticities charged in the indictment or proven in the evidence; (6) In construing the Clayton and Norris-La Guardia Acts as not applying to the activities charged in the indictment or proven in the evidence; (7) In affirming the following: (a) the denial of petitioners' several motions for a directed verdict at the close of all the evidence; (b) the giving of respondent's instructions to the jury; (c) the refusal of or modification of petitioners' requested instructions; (d) the charge to the jury; (e) the denial of petitioners' motion to set aside the verdict and to enter judgment for the petitioners; (f) the denial of petitioners' motion in arrest of judgment; (g) the denial of petitioners' motion for a new trial; and (h) the entry of judgments on the verdict and the assessment of fines against petitioners.

ARGUMENT

I.

The Word "Trade" in Sec. 3 of the Sherman Act Does Not Include the Practice of Medicine and the Rendering of Medical Services as Described in the Indictment, Because They Are Not "Commercial" in Nature.

What is the meaning of the word "trade" in Sec. 3 of the Sherman Act? The meaning of the words or phrases or language generally of a statute may be determined by consideration of:

(1) The natural meaning of the words or phrases used, both singly and in combination;

(2) The meaning which the courts have given to the words or phrases used;

(3) The legislative history of the statute;

(a) As to the evils the legislators were considering and attempting to reach and prevent;

(b) As to the field intended to be covered by the statute.

1. THE NATURAL MEANING OF THE WORD "TRADE" EXCLUDES THE PROFESSIONS.

What is the natural and ordinary meaning of the word "trade"? All of the dictionaries agree that in the broadest meaning ever ascribed to "trade" to date it has never been understood to include the arts or the learned professions. Professors, students and ordinary laymen in the United States would not understand the word "trade" to include the learned professions. Hence if the meaning of the word "trade" in the Act includes the learned professions it is for some reason other than the natural meaning of the word.

2. JUDICIAL DEFINITIONS OF THE WORD "TRADE" EXCLUDE THE PROFESSIONS.

As to the meaning which the courts have given to the word "trade" we submit that beginning in 1829 and continuing to date, except for the decisions of the court below in this case, it has been consistently held, both in the federal and state courts, that the word "trade" did not include the learned professions. Three of these cases were decisions of this Court under the Sherman Act, one a decision of this Court under the Federal Trade Commission Act, two state court decisions construing the Sherman Act, and numerous decisions of this Court, of United States Courts of Appeal and of state courts construing the word "trade" under various federal and state statutes. We propose to

discuss first the decisions of this Court under the Sherman Act and Federal Trade Commission Act in chronological order, then the decisions of the state courts that pertain to the Sherman Act, and then the other decisions of this Court, the federal courts and the state courts pertaining to the meaning of the word "trade."

Federal Club v. *National League* (1922) 259 U. S. 200, was decided on a writ of error to the Supreme Court of the District of Columbia. This Court held, Holmes, J., that the business of playing professional baseball was not "trade or commerce" within the meaning of Sec. 1 of the Sherman Act. The language of the opinion is just as applicable to Sec. 3 as it is to Sec. 1, because this Court said (p. 209):

> "The exhibition (playing baseball), although made for money would not be called trade or commerce in the commonly accepted use of those words. * * * personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportion that we have mentioned takes place. * * * a firm of *lawyers* sending out a member to argue a case, * * * does not engage in such commerce because the lawyer * * * goes to another State." (Italics supplied.)

In the foregoing the thought is clear and the meaning plain that personal effort not related to production is not trade or commerce in the District of Columbia and also that the *practice of law* is not trade or commerce in the District of Columbia, because this Court held (p. 209):

> "That which *in its consummation* is not commerce does not become commerce among the States because the transportation that we have mentioned takes place." (Italics supplied.)

In *Federal Trade Commission* v. *Raladam Co.*, (1931) 283 U. S. 643, the Federal Trade Commission issued a

complaint charging the respondent with using unfair methods of competition in interstate commerce. It was charged that the respondent manufactures, advertises, and sells a preparation for internal use denominated an "obesity cure." The complaint alleged that the acts and practices of the Raladam Company are all to the prejudice of the public and of competitiors of respondent and constitute unfair methods of competition. The Commission issued a cease and desist order. The Court of Appeals reversed the order. This Court affirmed the decision of the Court of Appeals. It was contended that the business injured by the advertising and other activities of the Raladam Company was the business of doctors, because they prescribed for obesity. The question was presented whether the activities of Raladam Company were unfair competition to doctors. This Court held that the Federal Trade Act and the Sherman Act concern the same subject matter and then ruled squarely that doctors were not in competition with the Raladam Company because "they follow a profession and not a trade" and there being no evidence in the record that Raladam Company had any competitors, there was no evidence of unfair competition and no violation of the Act. If the practice of medicine be "trade" under the Federal Trade Commission or Sherman Acts, then the Raladam Company would have had competitors and a different result might have been reached in the *Raladam* case.

In *Atlantic Cleaners & Dyers* v. *United States* (1932) 286 U. S. 427, the question before this Court was whether the business of cleaning and dyeing clothes in the District of Columbia was "trade" within the meaning of Sec. 3 of the Sherman Act. The case was decided on the pleadings, and it was held that such business was "trade." That decision was in accord with the doctrine laid down in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, because there

is little doubt that the business of cleaning and dyeing clothes is a "commercial" and "business" activity. While it is true that members of the learned professions were not parties to the case, nevertheless the issue before this Court called for a definition of "trade" within the meaning of Sec. 3 of the Sherman Act, and this Court in giving that definition necessarily stated what was excluded from as well as what was included in, the definition of the word "trade" and held that the professions were not within Sec. 3.

The opinion in the *Atlantic Cleaners & Dyers* case made certain statements with reference to the fact that Sec. 1 of the Sherman Act pertained to interstate commerce, and Sec. 3, *in part*, pertained to commerce within the District of Columbia. This Court recognized that Sec. 3 is not confined to commerce within the District but by its specific terms covers interstate commerce into and out of the District. The opinion, properly analyzed, said that the word "trade" had a broad and a narrow meaning, and under the rules of statutory construction the Court was at liberty to give the word the broader meaning. This Court then held that even under the broader meaning, the liberal arts and the learned professions were not included within the meaning of the word "trade," but that the word did include local "commercial" and "business" activities.

This Court then adopted the following definition of "trade" given by Mr. Justice Story (p. 436):

> "Whenever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*."

This Court then said (p. 437):

> "We think the word 'trade' was used in Sec. 3 of the Sherman Act in the general sense attributed to it by

> Justice Story, and at least, is broad enough to include the acts of which the Government complains."

Any ambiguity in that opinion was cleared up by *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, wherein this Court held, with reference to both Secs. 1 and 3, as follows (p. 495):

> "It was in this sense of preventing restraints on *commercial competition* that Congress exercised 'all the power it possessed.' *Atlantic Cleaners & Dyers v. United States*, supra, 435." (Italics supplied.)

Apex Hosiery Co. v. *Leader*, *supra*, held in substance and effect that no activity could be in "trade" within the meaning of either Secs. 1 or 3 of the Sherman Act unless it was a "commercial" activity. It is clear from the *Apex* case that this Court was of the opinion that Congress in enacting Sec. 3 of the Sherman Act intended that the word "trade" therein should have the same meaning as in Sec. 1 thereof, except that the trade and commerce within the district did not have to be interstate trade and commerce.

In *United States* v. *American Medical Ass'n*, 72 App. D. C. 12, 110 F. 2d 703, hereinafter called the first *American Medical Ass'n* case, the Government contended and the court below agreed that the Sherman Act was a broad, remedial statute covering all activities of every individual. In that case the court said (p. 711), "the common law governing restraints of trade has not been confined, as defendants insist, to the field of commercial activity ordinarily defined as 'trade,' but embraces as well the field of the medical profession." The subsequent opinion in the *Apex* case overruled that proposition of law. The United States in its brief filed in *United States* v. *Hutcheson*, 312 U. S. 219, 222, conceded to this Court that "The test laid down in that case (*Apex Hosiery Co.* v. *Leader*) is whether the restraint is upon *commercial competition* * * *."

In the first *American Medical Ass'n* case, relying on *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, the court held that Congress had exercised its full power in enacting Sec. 3 and that, therefore, Sec. 3 was broader than Sec. 1, and that the word "trade" in Sec. 3 was intended (p. 710) "to cover all occupations in which men are engaged for a livelihood." The court below did not correctly analyze the opinion in the *Atlantic Cleaners & Dyers* case. The *Apex* case correctly analyzed that opinion and said that Congress exercised its full power in a more limited sense in enacting both Secs. 1 and 3, and held (p. 495):

> "Because many forms of restraint upon *commercial* competition extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act. 21 Cong. Rec. 2456. It was in this sense of preventing restraints on *commercial* competition that Congress exercised 'all the power it possessed.' *Atlantic Cleaners & Dyers* v. *United States*, supra, 435." (Italics supplied.)

We understand from the *Apex* case that, in enacting Secs. 1 and 3, Congress exercised all the power it possessed in the District of Columbia and elsewhere *only* (p. 495) "in this sense of preventing restraints on *commercial* competition." (Italics supplied.)

In the first *American Medical Ass'n* case the court held (p. 712) every person individually has the right under the Sherman Act to be free in his trade, business or profession, and held (p. 712) that the talents of any and every person are "trade" under Sec. 3 of the Sherman Act, but the *Apex* case held that the word "trade" in the Sherman Act applies only to *commercial* transactions.

In the *Apex* case this Court reviewed the legislative history of the Sherman Act, repudiated the theory of the first *American Medical Ass'n* case that the Sherman Act covers

every individual in the employment of his skill or capital and held (p. 490) the act was not a "policing" act and said (pp. 491-492):

> "It was another and quite a different evil at which the Sherman Act was aimed. It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital, organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in *business and commercial transactions* . . . ." (Italics supplied.)

In footnote 15 (p. 493) this Court said:

> "The history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that '*business* competition' was the problem considered and that the act was designed to prevent restraints of trade which had a significant effect on *such* competition." (Italics supplied.)

The legislative history, of which this Court spoke applied to Sec. 3 as well as Sec. 1. Those sections had no separate legislative history. The *Apex* case, we submit, overruled the holding in the first *American Medical Ass'n* case that Sec. 3 is not confined to "business and commercial" transactions.

The meaning to be given the word "trade" as used in the Act and the "full power" exercised in enacting Secs. 1 and 3 of the Act are construed by this Court as follows (pp. 494-497):

> "For that reason the phrase 'restraint of trade' which, as will presently appear, had a well-understood meaning at common law, was made the means of defining the activities prohibited. The addition of the words 'or commerce among the several states' was not

an additional kind of restraint to be prohibited by the Sherman Act but was *the means used to relate the prohibited restraint of trade to interstate commerce* for constitutional purposes, *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 434, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate *commerce*. Because many forms of restraint upon *commercial competition* extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act, 21 Cong. Rec. 2456. It was in this sense of preventing restraints on *commercial competition* that Congress exercised 'all the power it possessed.' *Atlantic Cleaners & Dyers v. United States*, supra, 435.' (Italics supplied.)

"A second significant circumstance is that this Court has never applied the Sherman Act in *any case, whether or not involving labor organizations or activities*, unless the Court was of opinion that there was some form of restraint upon *commercial competition* in the marketing of goods or services and finally this court has refused to apply the Sherman Act in cases like the present in which local strikes *conducted by illegal means* in a production industry prevented interstate shipment of *substantial amounts of the product* but in which it was *not* shown that the restrictions on shipments had operated to *restrain commercial competition in some substantial way*." (Italics supplied.)

This Court clearly pointed out that the common law doctrine of restraints of trade was well understood long before the enactment of the Sherman Law, and was taken over into the law and applied to "*commercial competition*" *only* when their purpose or effect was (p. 500, 501) "to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade • • • or injuriously restrained trade."

Thus the *Apex* case differs with the holding in the first *American Medical Ass'n* case that the Sherman Act is a "chart" covering all activities of the citizen, whether commercial or not, and the public injury is measured by the injury to the individual. As the *Apex* case points out, that is erroneous, as the Sherman Act is not a policing statute, is not predicated upon individual injury, and is limited to *commercial* activities.

Respondent in its brief filed in the Court of Appeals in the first *American Medical Ass'n* case (p. 24), conceded, with reference to the charge in the indictment, that "these restraints are not upon commercial and industrial activities, but upon the marketing of a professional service."

In the first *American Medical Ass'n* case it was held (p. 714) that the actions of GHA in no way tend to commercialize the practice of medicine and that (p. 714) "the practice of medicine in the District of Columbia is subject to licensing and regulation and we think may not be lawfully subjected 'to commercialization or exploitation'."

American Medical Ass'n v. *United States* — App. D. C. —, 130 F. 2d 233, hereinafter called the second *American Medical Ass'n* case, was decided after the *Apex* case. In the second *American Medical Ass'n* case the court erroneously said (p. 235): "the practice of medicine was recognized by the English cases as constituting trade." and that a restraint on the practice of medicine may constitute a restraint of trade.[10] In direct contradiction of that holding,

[10] Those cases do not hold the practice of medicine to be trade, and that specific issue was not raised or decided in those cases. The English cases dealt with the validity of ancillary covenants incident to the sales of professional practices. While a few of those cases, in determining the validity of covenants not to practice medicine in a given locality or during a given time, apply the rule announced in "restraint of trade" cases, "restraint of trade" was not the basis for decision and the overwhelming majority of those cases are based upon principles of public policy, the law of contracts or local statutes and do not even mention "restraint of

later in the same opinion, the court below held (p. 237) that the activities of GHA's doctors were not commercialized and, as we understand the opinion, not "trade". Notwithstanding the court below held the activities of GHA's doctors were not commercialized it held that the activities of GHA were commercial. The sole activity of GHA is the rendering or providing of medical services to its members, and we are unable to understand the reasoning of the Court of Appeals in holding the activities of GHA to be commercial and the activities of its doctors, not commercialized. In making that, to us, impossible distinction the court did not appear to consider that GHA was organized under the District of Columbia Code (1940) Title 29, Secs. 29-601 to 29-605, which provides for the incorporation of charitable, educational, and religious associations. We submit that the activities of a corporation so organized could hardly be "commercial".

The court said (p. 236) the trade or commerce involved was of three kinds; "(1) the making available and financing of medical and hospital services; (2) medical service itself, i.e., service rendered by medical doctors; (3) hospital services, i.e., service rendered by hospital staffs and the use of hospital facilities."

We insist that such activities are but the practice of medicine and the rendering of medical services and that such activities are not "commercial", and hence not "trade".

Other decisions construing the Sherman Act also support our contention that the word "trade" does not include the professions.

In *Metropolitan Opera Co.* v. *Hammerstein* (1924, N. Y.) 162 App. Div. 691, it was held that the production of grand

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trade." The *Apex* case considered the English cases and concluded that only "commercial" activities are within the meaning of the word "trade" as used in the Sherman Act.

opera was not within the meaning of the word "trade" as used in the Sherman Act. It would seem that the court was also of the opinion that the practice of medicine or law were likewise not within the meaning of the word "trade" in the Sherman Act because it said, (p. 695): "If the production of opera is trade or commerce, it would seem to follow that every museum which exhibits pictures, every university which gives courses of instruction or lectures, every *lawyer* who prepares a brief, every *surgeon* who performs an operation * * * is engaged in commerce." (Italics supplied). That opinion was affirmed by the Court of Appeals (Cardozo, J., concurring) 221 N. Y. 507, 116 N. E. 1061.

In *Werth* v. *Fire Companies' Adj. Bureau* (1933) 160 Va. 845, 171 S. E. 255, the court in construing a state anti-trust law and the phrase "trade and commerce" as used in the Sherman Act held, under that state act and the Sherman Act, that insurance with its attendant and incident activities is not comprehended within the term "commerce" or its synonym "trade."

We turn now to the consideration of the cases from 1829 to date which have held, though not under the Sherman Act, that the practice of the learned professions is not trade or commerce.

In *Dandridge* v. *Washington*, (1829) 27 U. S. 369, on an appeal from the Circuit Court of the District of Columbia, in an opinion by Marshall, C. J., in defining "trade," this Court said (p. 377):

> "The distinction between a profession and a trade is well understood; and they are seldom, if ever, confounded with each other, in ordinary language. If the testatrix had contemplated what, in the common intercourse of society, is denominated a profession, she would scarcely have used a term which is generally received as denoting one of the mechanical arts."

So, at the time of the passage of the Sherman Act it was settled law in the District of Columbia, certainly since 1829, that the word "trade" in its ordinary meaning did not include the professions, and that is presumed to have been known to Congress.

In *The Schooner Nymph*, (1834) 18 Fed. Cas. 506, No. 10388, 1 Sumn. 516 (C. C., D. Maine) in construing a Coasting and Fishery Act, which declared that any licensed ship, employed in any other "trade" than that for which it was licensed, should be forfeited, Mr. Justice Story said (517, 518):

> "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*."

The *Nymph* case was decided prior to the enactment of the Sherman Act, and Congress would be presumed to know that it had been decided in the federal courts that the word "trade" did not include the liberal arts or the learned professions.

In *May* v. *Sloan*, (1879) 101 U. S. 231, this Court held (p. 237):

> "The word 'trade,' in its broadest signification, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally."

Thus this Court defined "trade" in what was said to be its *broadest* signification, and, yet, did not extend the meaning beyond the business of buying and selling for money, or commerce and traffic generally. This definition of "trade" is presumed to have been known to Congress when it enacted the Sherman Act.[11]

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[11] The Sherman Act became law on July 2, 1890. Sec. 6 of the Clayton Act was enacted October 15, 1914 (38 Stat. 731) 15 U. S. C. Sec. 17. The first sentence thereof provided, "The labor of a human being is not a commodity or article of commerce."

Graves v. *Minnesota* (1926) 272 U. S. 425, involved a prosecution for violating a statute of Minnesota by practicing dentistry without a license. The specific contention of the defendant was that the requirement of the statute that an applicant for a license must present a diploma from an approved dental college before he can be examined by the board was unreasonable, arbitrary, and discriminatory and violates the Federal Constitution. The defendant relied on decisions which struck down similar statutes, placing like requirements on the employments or trades of locomotive engineers and barbers. This Court held the dental statute in question did not violate the Federal Constitution and said that statutes pertaining to employments or trades of locomotive engineers and barbers manifestly involved very different considerations from those relating to such professions as dentistry, requiring a high degree of scientific learning.

If this Court in the *Graves* case thought the practice of medicine or dentistry was trade, and on a par with other trades, which follows from the decisions in the court below, then the *Graves* case might have been decided differently, and the statute in question there held unconstitutional under the "trade" cases cited by Graves.

Semler v. *Dental Examiners*, (1935) 294 U. S. 608, involved the validity of an Oregon statute relating to dentists, providing for the revocation of licenses for unprofessional conduct, including advertising. Plaintiff brought suit to enjoin the enforcement of the statute alleging that it violated the Federal Constitution. A demurrer was sustained to the complaint, and the suit was dismissed by the trial court. The supreme court of the state affirmed. The complaint alleged that complainant had habitually advertised and that his advertisements were truthful and that he had made contracts for display signs and for advertising in newspapers and had entered into other engage-

ments of which he would be unable to take advantage if the legislation was sustained, and that in that event his business would be destroyed or materially impaired. This Court held that the state could deal with the different professions according to the needs of the public in relation to each, and that the legislation in question did not violate the Federal Constitution. This Court said (p. 612):

> "The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the marketplace. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards."

While the construction of Sec. 3 of the Sherman Act was not involved yet the *Semler* case clearly held that the members of a profession, such as dentists or doctors, are not engaged in the competition of the market place and if that be true then under the *Apex* case they would not be in "trade" within Sec. 3 of the Sherman Act.

If the practice of medicine be "trade" and on a par with other trades, then the *Semler* case might have been decided differently and the statute in question held unconstitutional. If the professions be "trade," then all

statutes pertaining to the professions are subject to attack on constitutional grounds.

The court below asserted in the second *American Medical Ass'n* case (p. 245) that the *Graves* and *Semler* cases were not in point because they pertained to the police power of the states. Such an assertion is beside the point. Those cases were definite holdings by this Court that the word "trade" does not include the learned professions. They also serve to point out the chaos that will be created in the law of the various states, if the word "trade" in the Sherman Act is held to include the learned professions.

In re United States Hotel Co., (1904), 134 Fed. 225 and *Toxaway Hotel Co.* v. *Smathers*, (1910) 216 U. S. 439, it was held that the operations of hotels and the incidental activities connected therewith were not "trade" within the meaning of the Bankruptcy Act.

In *Jeu Jo Wan* v. *Nagle*, (1925) 9 F. 2d 309, it was held (p. 310) even under a treaty of commerce, which would involve the broadest construction of the word "trade," that:

> "The word 'trade,' in its *broadest* signification, * * * is not broad enough to include a mere teacher, especially when the term 'trade' is used in connection with commerce * * *." (Italics supplied.)

The following state decisions hold that the word "trade" does not include the learned professions: *Yocum* v. *Feld*, 129 Fla. 764, 176 So. 753 (doctor); *Slocum* v. *City of Fredonia*, 134 Kans. 853, 8 P. 2d 332 (doctor); *Whitcomb* v. *Reid*, 31 Miss. 567, 569 (dentistry); *People* v. *Kelly*, 255 N. Y. 396, 175 N. E. 108 (music teaching); *Iselin* v. *Flynn*, 154 N. Y. S. 133 (doctor).

There is, therefore, no judicial authority for defining "trade" as including activities in the professions. There

remains for attention the legislative history of the Sherman Act.

3. THE LEGISLATIVE HISTORY OF THE SHERMAN ACT REQUIRES A DEFINITION OF "TRADE" THAT EXCLUDES THE PROFESSIONS.

As to the legislative history of the Sherman Act pertaining to the meaning of the word "trade" therein, this Court in the *Apex* case exhaustively commented on the evils the legislators were considering and attempting to reach and prevent, and also the field the legislators intended to cover by the Act.

This Court held (p. 490):

> "The legislative history of the Sherman Act as well as the decisions of this Court interpreting it, show that it was not aimed at *policing* interstate transportation or movement of goods and property. The legislative history and the voluminous literature which was generated in the course of the enactment and during fifty years of litigation of the Sherman Act *give no hint* that such was its purpose." (Italics supplied.)

This Court continued (p. 491-492):

> "It was another and quite a different evil at which the Sherman Act was aimed. It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The *end* sought was the prevention of restraints to free competition in *business and commercial transactions* * * *." (Italics supplied.)

In footnote 15 (p. 493) this Court said:

> "The history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that '*business competition*' was the

problem considered and that the Act was designed to prevent *restraints of trade* which had a significant effect on *such* competition." (Italics supplied.)

In view of the foregoing language of this Court it is idle to contend that Congress intended to include non-commercial activities within the meaning of the word "trade" as used in the Sherman Act.

Thus whether we turn to the natural meaning of the word "trade," or the judicial definitions of the word "trade" or the legislative history of the Sherman Act we reach the inescapable conclusion that the word "trade" in Sec. 3 of the Sherman Act concerns only "commercial" activities and excludes the learned professions.

NONE OF THE FIVE ACTIVITIES ALLEGED TO HAVE BEEN RESTRAINED WERE "TRADE" UNDER THE SHERMAN ACT.

Let us consider the five activities alleged to have been restrained and see if they or any of them are "trade" under the Sherman Act.

1. Is GHA a "commercial" or "business" activity? It was organized under the District of Columbia Code (1940) Title 29, Secs. 29-601 to 29-605, which provides for the incorporation of charitable, educational, and religious associations. Its sole activities are to collect dues from its members, pay rent for and maintain a suite of doctors' offices, with the usual appurtenances thereto, employ doctors to render medical services, within limits, to its members and to pay, within limits, the hospital bills of its members. We insist that such activities are not "commercial" or "business" activities.

2. Are the members of GHA engaged in a "commercial" or "business" activity? We think even the Government has abandoned any contention that the Government em-

ployees are engaged in a "commercial" or "business" activity.

3. Is the activity of the doctors employed by GHA a "commercial" or "business" activity? In the second *American Medical Ass'n* case the court said that activities of the doctors employed by GHA are not commercialized, and we understand therefore, not engaged in a "commercial" or "business" activity.

4. Is the practice of medicine by the medical profession generally a "commercial" or "business" activity? It would seem to follow as a matter of course, if the GHA doctors are not engaged in a "commercial" or "business" activity, that doctors generally are not.

5. Are the Washington hospitals, or that part of their activities here involved, "commercial" or "business" activities? We insist that the activities of the Washington hospitals here involved are not "commercial" or "business" activities. In the second *American Medical Ass'n* case the court concedes (p. 238) that there is authority for the proposition that private hospitals supported by appropriations and charity are not engaged in trade, business, or industry,[12] but concludes, without any support in the evidence, that it has no doubt that the hospitals described in the indictment were engaged in trade within the meaning of the Sherman Act, citing *Jordan* v. *Tashiro*, 278 U. S. 123, 127-129. In the *Jordan* case the articles of incorporation provided for "a business corporation with a share capital of $100,000.00," and the facts there showed that such a "business" was within the provisions of the

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[12] *Western Pennsylvania Hospital* v. *Lichliter*, 340 Pa. 382, 387, 17 A. 2d 206, 209, 132 A. L. R. 1146; *City of Rochester* v. *Rochester Girls' Home*, 194 N. Y. S. 236, 237; *Easterbrook* v. *Hebrew Ladies' Orphan Society*, 85 Conn. 289, 298, 82 A. 561, 564; Note, 41 L. R. A., N. S. 615; *Lawrence* v. *Nissen*, 173 N. C. 359, 364, 91 S. E. 1036, 1038.

treaty involved. Such proof as there was in the record in this case tends to show that the Washington hospitals are non-profit institutions for the care of the sick, and their funds are used for that purpose (R. 591, 1338).

Moreover, under the evidence herein the only way the hospitals were involved in this case was in the matter of the appointment or refusal to appoint GHA doctors to the hospital staffs. Such appointment or non-appointment clearly does not pertain to a "commercial" or "business" activity. With reference to this point the District Court in its opinion in this case (28 F. Supp. 752, 757) very properly said:

> "Finally, when the indictment is carefully studied in all its parts, each in relation to the others, it is difficult to escape the conclusion that in its substantial realities the scheme set forth *directly* centered upon various forms of restraint to be exerted against physicians in rendering treatment and care to their patients, and that all else is *incidental* to that design. If restraint upon doctors was the only real direct and immediate effect, any indirect effects upon the Association (GHA) or hospitals would not suffice to support the charges as to them."

We think it is perfectly clear that under the indictment, and certainly from the evidence, the "trade" claimed to have been restrained was the practice of medicine and the rendering of medical services. The District court so held on demurrer to the indictment. The court below in its first and second opinions seems to hold under the indictment and the evidence that the alleged restraints concerned "medical care and hospitalization" and "medical services." We insist that medical care, medical services and hospitalization are all part and parcel of the practice of medicine. If any one of the five activities alleged to have been restrained is not "trade" under Sec. 3 of the Sherman

Act, then petitioners are entitled to a reversal of the judgments below. This is so because petitioners moved for a directed verdict as to *each* (R. 1454-1455) and all (R. 1454) of the five activities charged to have been restrained. The trial court denied those motions and over petitioners' objections and exceptions charged the jury that petitioners could be convicted if any one of those five activities was restrained. After verdict petitioners moved for judgment n.o.v. (R. 1517, 1518), for a new trial (R. 1519-1524) and in arrest of the judgments (R. 1518, 1519). If any one of the five activities was not "trade" under Sec. 3 of the Sherman Act, then no one is able to determine whether or not the jury returned its verdict based on a restraint of an activity that was not "trade" under Sec. 3 of the Sherman Act. *Stromberg* v. *California*, 283 U. S. 359, 367-370; *Thornhill* v. *Alabama*, 310 U. S. 88, 96; *Garland* v. *Davis*, 45 U. S. (4 How.) 131; *Baltimore and O. R. Co.* v. *Reeves*, 10 F. 2d 329,330, 331; *Patton* v. *Wells*, 121 F. 337, 340; *St. Louis, I. M. & S. Ry. Co.* v. *Needham*, 63 F. 107, 113, 114; *Mauderville* v. *Cookenderfer*, 3 Cranch, C. C. (3 D. C.) 257, Fed. Cas. No. 9,009. Furthermore, if any one of the five activities alleged to have been restrained was not "trade" under Sec. 3 of the Sherman Act the court erroneously charged the jury that restraint on any one of the five classes alleged to have been restrained was sufficient to convict (R. 1508). *Stromberg* v. *Californit, supra; Maryland* v. *Baldwin*, 112 U. S. 490, 493.

II.

The Word "Restraint" in Sec. 3 of the Sherman Act Does Not Include Any Restraint That Does Not Fix Prices or Suppress Competition to the Extent That Market Prices Are Substantially Affected to the Injury of the Public.

The question presented under this point is whether the indictment charged or the evidence proved "restraints" of trade under Sec. 3 of the Sherman Act.

What is the meaning of the word "restraint" in Sec. 3 of the Sherman Act?

Apex Hosiery Company v. *Leader*, 310 U. S. 469 is now the law on the meaning of the word "restraint" in the Sherman Act. Little, if anything, is to be gained by a consideration of previous cases on this point. The *Apex* case considered all the previous cases which the Court thought had any material bearing on the question and also considered the legislative history of the Act and whether the Sherman Act took over the entire doctrine of restraint of trade at common law[13] or only part thereof. The Court decided that the word "restraint" in the Sherman Act, both in Secs. 1 and 3, does not include any restraint that does not fix prices or suppress competition to the extent that market prices are substantially affected to the injury of the public. Whatever the previous interpretations of the Sherman Act may have been or whatever the common law doctrine of restraint of trade may have been, we must look to the *Apex* case to determine the law today. The first *American Medical Ass'n* case was decided before the decision in the *Apex* case. In that case the Court of Appeals said (page 711):

> "The charge, stated in condensed form, is that the medical societies combined and conspired to prevent the successful operation of Group Health's plan, and the steps by which this was to be effectuated were as follows:
>
> "(1) to impose restraints on physicians affiliated with Group Health by threat of expulsion or actual expulsion from the societies;

[13] This court made its holding on this important point emphatic, when it said (page 500) contracts, combinations or conspiracies are to be condemned under the Sherman Act "only when their purpose or effect was to raise or fix the market price. It is in this sense that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices."

"(2) to deny them the essential professional contacts with other physicians, and

"(3) to use the coercive power of the societies to deprive them of hospital facilities for their patients."

The court said (p. 712), that the restraint charged would restrict the common liberties of Group Health, the doctors and the hospitals from engaging in the pursuit of their respective functions. As to the meaning of the word "restraint" in the act the court said (p. 713):

"It certainly cannot be doubted that Congress intended to exert its full power, in the public interest, to set free from unreasonable obstruction the exercise of those rights and privileges which are a part of our constitutional inheritance, and these include immunity from compulsory work at the will of another, the right to choose an occupation, the right to engage in any lawful calling for which one has the requisite capacity, skill, material, or capital, and thereafter the free enjoyment of the fruits of one's labors. Congress undoubtedly legislated on the common law principle that every person has individually, and that the public has collectively, a right to require the course of all legitimate occupations in the District of Columbia to be free from unreasonable obstructions; and likewise in recognition of the fact that all trades, businesses and professions, which prevent idleness and exercise men in labor and employment for the benefit of themselves and their families and for the increase of their substance, are desirable in the public good and any undue restraint upon them is wrong and is immediate and unreasonable and, therefore, within the purview of the Sherman Act."

It is thus clear that the court in the first *American Medical Ass'n* case held that the word "restraint" in Sec. 3 of the Sherman Act meant any restraint upon the freedom of

any individual in his pursuit of any lawful calling. It must be conceded by all that since the *Apex* case that is not the meaning of the word "restraint" in the Sherman Act.

On the trial of this case the judge applied the law as laid down in the Court of Appeals in its first opinion and which now clearly appears to have been erroneous.

In the second *American Medical Ass'n* case decided after the *Apex* case, the court below, in describing the intended restraints, departed from its opinion in the first *American Medical Ass'n* case and held (p. 238) that the indictment charges and the proof shows a suppression of competition in the matter of the activities of GHA and seems to hold that is sufficient to show a violation of the Sherman Act. The court says nothing as to whether the indictment charges or the proof shows that market prices of the activities of GHA were substantially affected to the injury of the public. The court seems to have overlooked that essential part of the definition of "restraint" as laid down in the *Apex* case.

The difficulty is that the indictment was drawn before the decision in the *Apex* case and did not charge a fixing of prices or a suppression of competition in the matter of the activities of GHA and did not charge that market prices for the activities of GHA were substantially affected to the injury of the public. It was based solely upon the theory of an injury to an individual or individuals. And, of course, there was no proof that meets the requirements of the *Apex* case.

In the case at bar, even if the indictment charged and the evidence showed (which is denied) acts that tended to restrain GHA, that fact alone would not spell out a violation of the Sherman Act, under the *Apex* case and the con-

curring opinion of Stone, C. J., in *United States* v. *Hutcheson*, 312 U. S. 219, 241, 242.[14]

The decisions below, holding that the indictment and the evidence show a violation of the Sherman Act, conflict with the *Apex* case, the cases following it [15] and two other Federal decisions.[16] Those cases all squarely hold only such restraints are within the act that restrain commercial activities, the effect of which is to affect the market, either by fixing prices or suppressing competition to the extent that market prices are substantially affected to the injury of the public. Those elements are neither pleaded nor proved in this record. There was not a scintilla of evidence to that effect.

In its brief in opposition to certiorari herein respondent attempted (p. 19) to inject "commercial competition" and "the market" into this case. The attempt comes a little late. No such elements were involved in either the indictment or the evidence. Those phrases are a belated attempt to bring this case within the law as declared in *Apex Hosiery Company* v. *Leader*, 310 U. S. 469. The indictment was drawn and the case was tried on an entirely different theory, i.e., that any restraint on any individual in earning a livelihood violates the Sherman Act. In fact, respondent conceded in its brief (p. 24) in the first *American Medical Ass'n* case that:

> "The present case, like other Sherman Act cases, has to do with restraints in a field of economic ac-

[14] In the *Hutcheson* case, respondent conceded to this Court that the "closing down of a factory" engaged in interstate business is not enough to show a violation of the Sherman Act, 312 U. S. 222.

[15] *International Lad's G. W. Union* v. *Donnelly G. Company*, 119 F. 2d 892, 898; *Gundersheimer's Inc.* v. *Baker, etc., I. Union*, 73 App. D. C. 352, 353, 119 F. 2d 205, 206; *United States* v. *Local 807 of I. Brotherhood, etc.*, 118 F. 2d 684-689, affirmed 315 U. S. 521; *International Ass'n. etc.* v. *Pauly Jail Bldg. Co.*, 118 F. 2d 615, 621; *United States* v. *Gold*, 115 F. 2d 236-238.

[16] *Konecky* v. *Jewish Press*, 288 F. 179; and *Swartz* v. *Forward Ass'n.*, 41 F. Supp. 294.

tivity. Broadly speaking, it *differs* from previous cases only in that some of *these restraints are, not upon commercial and industrial activities*, but upon the marketing of a *professional* service. On analysis it will be found that the case involves considerations of public interest and *individual* freedom that are common to all Sherman Act cases." (Italics supplied.)

Such a concession is fatal to this prosecution under the *Apex* case.

It is suggested in the second *American Medical Ass'n* case (p. 238) that if GHA was "injured" that fact deprived the public of the advantages of a free, competitive market, and is sufficient to show a violation of the Sherman Act. The opinion intimates that the *Apex* case so held. The *Apex* case did not so hold. In the *Apex* case the strikers took the Apex Company completely out of the market.

This Court said in the *Apex* case (p. 490) three circumstances were of significance in interpreting the Sherman Act: 1 (p. 490) the legislative history; (2) (p. 495) that this Court has never applied the Act in any case unless it was of opinion that there was some form of restraint upon commercial competition; 3 (p. 497) the common law doctrines relating to restraint of trade.

In discussing the first circumstance that must be taken into account, i.e., the legislative history of the Sherman Act, this Court held (p. 490-495) that history disclosed that the Sherman Act was enacted to prevent restraints on "commercial" or "business" activities which had been exercised or used in such a way as to affect the market either by fixing prices or suppressing competition in the market to the extent that market prices are affected (p. 500), to the injury of the public.

In discussing the second circumstance (pp. 495-497) that must be taken into account, i. e., previous opinions of this Court, this Court stated that the Sherman Act had never

been applied in any case unless it involved commercial competition in the market.

In discussing the third circumstance (p. 497) this Court referred to the common-law doctrine of restraint of trade, which this Court described as:

> "• • • contracts for the restriction or suppression of *competition in the market*, agreements to *fix prices*, divide *marketing* territories, apportion customers, restrict *production* and the *like* practices, which tend to *raise prices* or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market."[17] (Italics supplied.)

and held (page 497):

> "*Such* contracts were deemed illegal and were unenforcible at common law. But the resulting restraints of trade were not penalized and gave rise to no actionable wrong. Certain classes of restraints were not outlawed when deemed reasonable, usually because they served to preserve or protect legitimate interests, previously existing, of one or more parties to the contract." (Italics supplied.)

And (page 500):

> "• • • this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of *commercial competition*. In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of *commercial competition* has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under

[17] This Court's description of the common-law doctrines relating to restraint of trade is quite different from the description in the first *American Medical Ass'n* case wherein the court below said (p. 708): "The common-law rule was applied principally to contracts whereby a man promised not to engage in his occupation, • • •."

> the Sherman Act, and in general restraints upon competition have been condemned *only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices.*" (Italics supplied.)

And (p. 503):

> "Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods * * * an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."

Thus it is clear that the acts charged against petitioners are not within the Sherman Act as construed by this Court in the *Apex* case. The *Apex* case held that no restraint could be a violation of the Sherman Act unless it was exercised and used in such a way as to fix prices or suppress competition to the extent that market prices are substantially affected to the injury of the public.

The indictment herein did not attempt to charge price fixing or suppression of competition that affected market prices to the injury of the public. No such contention ever appeared until after the opinion in the *Apex* case. The indictment charged that the restraints were intended to prevent doctors from serving on the GHA staff, to prevent consultations between doctors on the staff of GHA and medical society members, and to prevent such staff doctors from operating in the hospitals. Not one word is said in the charging clauses of the indictment (R. 14, 15) about prices, price fixing or suppression of competition.

The concurring opinion of Stone, C. J., in *United States* v. *Hutcheson*, 312 U. S. 219, 241, 242, points out that a prosecution under the Sherman Act must fail if the indictment fails to charge price fixing or that competition has been suppressed to the extent that market prices have been substantially affected. As no such charge appears in this indictment and as no evidence thereon could be or was received this prosecution must fail.

The Government contended and the first *American Medical Ass'n* case held that the restraints complained of, obstructed citizens in the pursuit of their occupations, whether commercial or not, and that the Sherman Act was a general remedial statute intended to protect against such restraints. Then came this Court's decision in the *Apex* case, pointing out that the Sherman Act was not a general remedial statute, and was not intended to supersede local police laws, but was confined to price fixing or suppression of competition affecting market prices to the injury of the public. In the second *American Medical Ass'n* case the court sought to ignore the general remedial theory, established in its first opinion, by stating that GHA and petitioners were in "the bitterest kind of competition," and that a restraint visited upon GHA would prevent such competition, and therefore the troublesome *Apex* rule was complied with. But the court below failed to note that no such charge was pleaded in the indictment, was considered in the first *American Medical Ass'n* case, or presented upon the trial. Substituting an essential charge of price fixing or suppression of competition to that end *now*, is obviously an effort to avoid the effect of the *Apex* case and the concurring opinion of Stone, C. J., in the *Hutcheson* case, and comes a little late.

The indictment fails to charge and the proof fails to show any restraints on the Washington hospitals that violate the Sherman Act.

In that regard the indictment charges (R. 15): "for the purpose of restraining the Washington hospitals in the business of operating such hospitals."

Manifestly the thought which one would receive from such a charge was that any restraint on the Washington hospitals would violate the Sherman Act. There is no charge as to what activities of the hospitals were "restrained"; there is no charge that prices of hospital services were fixed or that competition between hospitals was suppressed to the extent that market value of hospital services were substantially affected to the injury of the public. There being no allegation of that nature in the indictment, there could have been no proof on those indispensable elements.

Such evidence as there was that related to the hospitals concerned the matter of some of GHA's hired doctors obtaining staff privileges at such hospitals. Thus respondent stated in its brief in opposition to certiorari (p. 11) that the hospital evidence concerned the denial by the hospitals of staff privileges to GHA's staff and (p. 12) the sending of DMS of a *recommendation* to the hospitals that they appoint members of their staffs from members of DMS and AMA.

No evidence was offered to prove any "restraints" whatsoever upon the hospitals. Certainly there was no evidence showing that prices at any hospital were fixed or that the competition between any hospitals or the hospitals and anyone else was affected *in any way*, much less so suppressed that the prices of hospital services were affected substantially to the injury of the public.

We submit that respondent, in effect, has conceded, that its theory of the charge and the evidence is that they involve (Brief in Opposition, p. 19) "restraints" against GHA in "competing with doctors engaged in private practice." Nowhere in its brief in opposition does the respondent de-

scribe the business of a single hospital, much less attempt to show a "restraint" on the business of any hospital.

In the *Apex* case the Court (p. 499, 500) stated that the restraints which were condemned by the Sherman Act were those found "unreasonable or undue" and the effect "substantial". The court said that the restraints prohibited are those which are so substantial as to affect market prices and deprive purchasers or consumers of the advantages of free competition. But the advantages of free competition were not thought to be unduly affected unless market prices were fixed or there was a suppression of competition to the extent that market prices are substantially affected to the injury of the public. The court points out that a combination of employees causes restraint, but such restraint is not the restraint contemplated by the Act, and such restraint is not thought to be a violation of the Act and is not thought to be unreasonable, principally because it did not affect market prices. The effect on competition by efforts to make a labor combination effective was also not thought to be within the prohibition of the Sherman Act.

Thus the *Apex* case does seem to imply a consideration of the amount and extent of restraint and the intention involved. The government insists that petitioners did three things: (1) prevented their members from accepting employment from GHA; (2) prevented their members from consulting with GHA doctors; and (3) sought hospital preferences for their members. If the evidence in the *Apex* case failed as a matter of law to show an intent to unreasonably restrain trade, we submit that the evidence here fails likewise to establish the requisite intent to unreasonably restrain trade.

The rules and regulations of DMS came into play only when GHA sought to proselyte petitioners' members. In the application of the rules to the employment controversy GHA's scheme brought into existence all of the known facts

concerning that scheme, and they must necessarily be considered. That is so in order to ascertain whether the evidence shows the necessary intent and intended restraints that are direct and unreasonable.

The evidence showed that GHA was incorporated to hire doctors to do its medical work (R. 295-298, 306). GHA sought "to hire" members of DMS to do its corporate medical work (R. 306). Such contracts of hire brought into the controversy, insofar as members of DMS were involved, the employment rules of DMS and the provision in the constitution of DMS that members' contracts of employment be approved by DMS (R. 1266, 1272).

The question of whether approval by DMS to the employment of its members by GHA be given or withheld, made all the facts concerning GHA's scheme of importance.

In the ensuing controversy, which was discussed by members of DMS and officers and trustees of GHA (R. 176-199), the employment rules of DMS preserving, among other things, free competition, were made known to GHA and it was questioned concerning its ability as set up to furnish good medical care, whether GHA's financing was sound, whether its plan of employing doctors on a full-time salary basis to the exclusion of the general profession might not conflict with the employment rules and constitution of DMS because the plan destroyed competition and tended to destroy the private practice of medicine.

A basis of employment of all members of DMS, who wished to participate, to furnish medical services to members of GHA, was suggested to GHA (R. 181, 185, 304).

GHA refused to divulge its plans of financing, stated it was going ahead with its plans even if they violated the employment rules of DMS and that the basis of employment suggested was not acceptable to GHA (R. 201).

As GHA employed members of DMS, its plan and its practices were important in the controversy that followed

between such employed members and the other members of DMS. In that dispute over employment entered the facts that *respondents'* United States Attorney and the law-enforcement officers of the District of Columbia had held GHA to be illegal and had ordered GHA to cease operating in violation of law (R. 373); that counsel advised petitioners that GHA's practices were illegal; that GHA was wrongfully using Government property, discount rates and $40,000 of public money, and an illegal "check-off" system to enforce the payment of dues (R. 376-378), and that the Comptroller General and a Committee of Congress had so held publicly; that GHA was subsidized, coerced members, solicited and advertised; and that GHA was not rendering and could not render good medical services. All such facts appear throughout the evidence and are also detailed in petitioners' offer of proof (R. 940-945) and are involved in all of the activities attempted to be proven to petitioners. Such facts negate any intent to unreasonably and directly restrain trade, and merely showed an effort to protect petitioners, their organizations and their members.

Therefore we insist that the alleged restraints in this case are not within the limits of the rule of the *Apex* case as to "unreasonable" restraint and "substantial" effect.

THE ACTIVITIES OF THE PETITIONERS SHOWN BY THE EVIDENCE WERE WITHIN THEIR LAWFUL RIGHTS, AND THE PURPOSES CHARGED TO PETITIONERS SHOULD BE INTERPRETED IN THE LIGHT OF THOSE RIGHTS.

While medical societies and member doctors have not heretofore been subjected to prosecution under the Sherman Act,[18] they have been the subject of many private civil

[18] The prosecution in this case was conceived in the opinion of a judge of a trial court in England, *Pratt* v. *British Medical Association*, 1 K. B. (1919) 244. That opinion arose out of an action in tort for damages on

suits quite similar, in allegation, to the facts alleged in this indictment. In such cases, instead of the interested parties seeking to persuade the United States to assume the burden of the case, the complainants themselves, have brought actions of various kinds. Practically every question of law and fact which is involved in this proceeding, has been fully considered and decided in those decisions.

The following decisions uniformly support the contentions which petitioners are urging in this case, and we ask particular attention of the Court to them.

In *Harris* v. *Thomas*, (Tex. Civ. App.) 217 S.W. 1068 it was said (pp. 1076, 1077):

> "It seems to be appellant's contention that his exclusion from the organization and appellees' refusal to affiliate with him * * * influenced others against him and deprived him of the fruits of his preparation as a practitioner. If appellees were acting to further their legitimate purpose or to advance the practice of their profession, this, we think, would be justified even if it had the result claimed by appellant. Unless the organization was itself illegal or the methods used by it were wrongful, appellant has no just complaint."
>
> "A voluntary association has the power to enact laws governing the admission of members and to prescribe the necessary qualifications for membership * * * Membership therein is a privilege which the society may accord or withhold at its pleasure, with which a court of equity will not interfere, even though the arbitrary rejection of a candidate may prejudice his material interest. * * * We think such a society as the Potter County Medical Association is legitimate and lawful. If it is an organization which is largely

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the theory that defendants maliciously conspired to injure plaintiff doctors. Actual malice and social persecution were involved. The judgment for plaintiffs was not appealed. Three years later the Appellate Division of the Kings Bench in the case of *Ware and DeFreville* v. *Motor Trade Association*, 3 K. B. (1921) 40, severely criticized the *Pratt* opinion, stating it was "quite impossible to harmonize" it with other decisions.

composed by the appellee doctors, and if it does directly or indirectly affect the material interest of appellant, or in some degree affect him as a nonmember, this would not justify the courts in denouncing it as an illegal or unlawful consiracy. The association has the right to advance its purpose or interest, and that of its members by all legitimate means. * * *"

In *Porter* v. *King County Medical Society*, 186 Wash. 410, 58 P. 2d 367, it was said (pp. 370, 372):

"That is to say, Doctors Sweet and MacKinnon, under this contract with the medical society, were required to obey the by-laws of the society or by breach thereof subject themselves to the penalty of suspension or expulsion from the society. It is not at all material how selfish or unselfish the objects of the medical society are if same are legitimate. It cannot be successfully contended that the medical society did not have the right to adopt the by-law in question. Whether such by-law or rule was just, reasonable, or wise is a question of policy which concerns only the medical society and its members. The medical society, in the enforcement of its by-laws for the direct purpose of benefit to itself and to its members is not answerable for damage incidentally resulting to a third person. So long as one remains a member of the medical society, such member can be compelled under his contract with the society to obey the laws, rules and regulations of the society or suffer the penalty of fine, suspension, or expulsion.

"* * * No right of appellants, who were nonmembers, was invaded by respondent medical society when it established its code of ethics and insisted upon compliance therewith through threat of expulsion of an offending member."

To the same effect see:

Bryant v. *District of Columbia Dental Society*, 26 App. D. C. 461; *Newton* v. *Board of Commissioners*, 86 Colo. 446, 282 P. 1068; *Olander* v. *Johnson*, 258 Ill. App. 89;

Irwin v. *Lorio*, 169 La. 1090, 126 So. 669; *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432; *Weyrens* v. *Scotts Bluff County Medical Society*, 133 Neb. 814, 277 N. W. 378; *Branagan* v. *Buckman*, 67 Misc. 242, 122 N. Y. S. 610, aff'd. 130 N. Y. S. 1106 and *Strauss* v. *Marlboro County General Hospital*, 185 S. C. 425, 194 S. E. 65.

Those decisions leave little to be said concerning the theory of the Government that members who refuse to abide by the rules and regulations, may still secure or retain the benefits and advantages of such membership, without any right on the part of the medical society to pursue proper disciplinary measures. While those cases did not involve the Sherman Act, they establish that petitioners had the lawful right to do every act which they did do. That being so, the intent and purpose here involved should be interpreted in the light of those rights.

NONE OF THE FIVE ACTIVITIES ALLEGED TO HAVE BEEN RESTRAINED WERE "RESTRAINED" IN VIOLATION OF THE SHERMAN ACT.

The evidence did not show a restraint as required by the *Apex* case on any one of the five activities alleged to have been restrained.

1. Was GHA restrained? We insist that the prices of GHA's activities were not fixed and competition therein was not suppressed to the extent that market prices were substantially affected to the injury of the public.

2. Were the members of GHA restrained? We insist that the prices of the activities of GHA's members were not fixed nor competition in the activities of GHA's members suppressed to the extent that market prices of their activities were substantially affected to the injury of the public.

3. Were the doctors employed by GHA restrained? We insist that the prices of the activities of GHA's doctors

were not fixed, nor competition in the activities of GHA's doctors suppressed to the extent that market prices of their activities were substantially affected to the injury of the public.

Was the medical profession generally restrained? We insist that the prices of the activities of the medical profession generally were not fixed, nor competition in the activities of the medical profession generally suppressed to the extent that market prices of their activities were substantially affected to the injury of the public.

5. Were the Washington hospitals restrained? We insist that the prices of hospital activities were not fixed nor competition in the hospital activities suppressed to the extent that market prices of their activities were substantially affected to the injury of the public.

As to the denial by the trial court of petitioners' motions to direct a verdict as to *each* and all of the five charges of restraint, and as to the instructions of the court that the jury might find petitioners guilty if any one of the five activities were restrained, our argument at the end of Point I in this brief is applicable here. If there is an insufficient charge or insufficient evidence as to any one of the five charges of restraint here involved, prejudicial error was committed against petitioners and the judgments below should be reversed.

III.

A Dispute Concerning Terms and Conditions of Employment of Doctors, Which Was Within the Clayton and Norris-La Guardia Acts, Was Involved, in Which Petitioners Were Interested. The Case is Therefore Not Within the Sherman Act.

In the second *American Medical Ass'n* case the court below seemed to concede (p. 242) that a dispute concerning

terms and conditions of employment of doctors was involved in this case, in which petitioners were interested, but held that the Clayton and Norris-LaGuardia acts were not applicable for two reasons: (1) that the Acts do not include doctors working for a monthly salary or lawyers, chemists, teachers, or actors, but are limited to disputes between working men, wage-earners, or laborers, on the one hand, and aggregated capital on the other; and (2) even though petitioners were interested in a labor dispute within the meaning of the Clayton and Norris-LaGuardia acts, if their activities involved a restraint upon competition, they are nevertheless within and subject to the Sherman Act (p. 244). We respectfully submit that such an interpretation of the Clayton and Norris-LaGuardia acts is erroneous. The court below has held that the liberal arts and learned professions are "trade" within the meaning of the Sherman Act and then held they are not "trade" within the meaning of the word "trade" and other similar words as used in the Clayton and Norris-La Guardia acts. Such a holding is not logical. We insist that if the practice of medicine is "trade" or even if the doctors employed on a monthly salary by GHA are in "trade" or even if GHA is in "trade" and employs doctors on monthly salaries to carry on that "trade" the Clayton and Norris-LaGuardia acts are applicable here.

The dispute concerning terms and conditions of employment of doctors arose in the following manner: When a committee of the executive committee of DMS and representatives of GHA conferred for the first time (R. 290-309), a controversy arose, the matrix of which was the terms and conditions of employment by GHA of members of DMS to perform GHA's corporate medical work. GHA rejected an offered basis of employment of members of DMS (R. 181, 185, 304), insisted upon dictating the terms, conditions, and method of payment of compensation and of

employing members of DMS, regardless of whether GHA's plans were illegal or in conflict with the constitution and employment rules of DMS (R. 201). This controversy over terms and conditions of employment continued throughout the indictment period and was involved in all of the activities charged or proven; hence because of the Clayton and Norris-LaGuardia Acts this case is not within the Sherman Act. *United States* v. *Hutcheson*, 312 U. S. 219; *United States* v. *Carrozzo*, 37 F. Supp. 191, affirmed 313 U. S. 508; *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552; *Drivers Union* v. *Lake Valley Co.*, 311 U. S. 91; *Gundersheimer's, Inc.*, v. *Bakery, etc., I Union*, 73 App. D. C. 352, 353, 119 F. 2d 205, 206; *International Ladies G. W. Union* v. *Donnelly G. Co.*, 119 F. 2d 892, 898; *International Assn.* v. *Pauly Jail Bldg. Co.*, 118 F. 2d 615, 621; *United States* v. *American Federation of Musicians*, — F. Supp. — (D. C. Ill., No. 4541, decided Oct. 14, 1942);[19] and the plain language of the Clayton and Norris-La Guardia Acts.

If doctors be in trade, it necessarily follows that Secs.

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[19] The *Musicians* case involved a bill in equity by United States to enjoin the American Federation of Musicians, comprising 140,000 musicians, which were virtually all the musicians in the nation who make music for hire, from violating the Sherman Act by restraining commerce in phonograph records, transcriptions and radio broadcasts. The bill alleged "that a purpose of the conspiracy is to eliminate from the market the manufacture, sale and use of musical compositions mechanically recorded on phonograph records and electrical transcriptions unless the persons engaged in such businesses enter into agreements with the defendant union to hire such useless and unnecessary labor as the defendant union may demand; that a further purpose of said conspiracy is to exclude from the market the competition of anyone who does not exclusively employ members of the defendant union." The court held the Clayton and Norris-La Guardia Acts were applicable and held that "the acts complained of may not be considered or held to be violations of any law of the United States" and granted defendants' motion to dismiss the bill.

And compare "labor dispute" immunity conferred by Anti-Racketeering Act as interpreted in *United States* v. *Local 807 of I. Brotherhood, etc.*, 118 F. 2d 684, 686, 689, affirmed 315 U. S. 521.

6 and 20 of the Clayton Act are applicable. Sec. 6 provides that the labor of a human being is not a commodity of commerce. Sec. 20 covers all employers and employees including corporations and associations and, as expanded by Sec. 13 of the Norris-LaGuardia Act, includes all persons and associations involved in a dispute over terms or conditions of employment who are engaged in the same *industry, trade, craft,* or *occupation,* or have direct or indirect interests therein. The Acts cover any third party, even though that party be a corporation not in trade [20] and employers and their associations [21] even if only *indirectly* interested in the controversy. The Clayton and Norris-LaGuardia Acts cannot logically be confined exclusively to the laborer who works for wages. Their plain terms require that they be applied to all "who are engaged in the same *industry, trade, craft,* or *occupation.*"

As GHA's willful employment (R. 173, 174) of doctor-members of DMS (and AMA) and the terms and conditions of such employment was the matrix of this controversy,[22] it follows that the acts charged or proven to petitioners are not within the Sherman Act.

The charge is that petitioners restrained GHA in its employment of doctors to render medical services to the members of GHA. How, if doctors are in "trade" under the Sherman Act, and are in a dispute over employment, they are not within the words "trade" or "occupation," as those words are used in the Clayton and Norris-La Guardia Acts, is difficult for us to understand.

The record in this case shows that petitioners, GHA, its members and doctors, other Washington doctors, and Washington hospitals were all directly (and certainly indirectly) interested in a controversy concerning terms and conditions

[20] *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552.
[21] *Drivers Union* v. *Lake Valley Co.*, 311 U. S. 91, 93, 94.
[22] *Columbia River Packers Assn.* v. *Hinton*, 315 U. S. 143, 147.

of employment of doctors by GHA within the Clayton and Norris-La Guardia Acts.

If doctors are "tradesmen" any controversy or dispute that may arise between themselves or between them and any other person concerning terms and conditions of employment of doctors is lifted bodily out of the Sherman Act by the Clayton and Norris-La Guardia Acts.

In *United States* v. *Hutcheson*, 312 U. S. 219, the conceded facts showed an admitted conspiracy on the part of the labor unions and their officers to restrain interstate trade and commerce, to engage in primary and secondary boycotts, to circulate black lists, to induce and coerce breaches of contracts, and like oppressive purposes, with force and violence, for the purpose of restraining trade. This Court held that the legality of such conduct is to be determined only by reading the Sherman Act, the Clayton Act, and the Norris La-Guardia Act as a harmonizing text. In the light of the three Acts this Court measured the conduct described in the indictment in the *Hutcheson* case and concluded that the defendant labor unions and their officers were engaged in a "dispute" or "labor dispute" as defined in the Clayton and Norris-La Guardia Acts, and therefore they were lifted bodily out of the Sherman Act.

In the first *American Medical Ass'n* case the court below held (p. 712) that when labor unions go so far as to impose unreasonable restraints on the operations of their field, they become subject to the prohibition of the Sherman Act, and referred to and relied on such cases as *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, and *Bedford Cut Stone Company* v. *Stone Cutters' Assn.*, 274 U. S. 37. The court below also held in that opinion (p. 711) that Congress did not provide that one class, any more than another, might impose restraints or that one class, any more than another, might be subjected to restraint. That

theory of the meaning of the Sherman, Clayton and Norris-La Guardia Acts was all changed by the *Hutcheson* case. In fact, the United States in its brief in the Supreme Court in the *Hutcheson* case relied on the first *American Medical Ass'n* case, the *Duplex Printing Press Co.* case, the *Bedford Cut Stone Company* case, and *Pratt* v. *British Medical Association*, 1 K. B. (1919) 244, but this Court abandoned those cases and similar cases and decided henceforth the Sherman Act would be construed in the light of the Clayton and Norris-La Guardia Acts, and certain classes of persons—who were engaged in the same industry, trade, craft, or occupation, or had direct or indirect interest therein, if and when engaged in a dispute or controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms and conditions of employment, regardless of whether or not the disputants stand in proximate relation of employer and employee—would be lifted bodily out of the Sherman Act, and it would no longer apply to them.

The *Hutcheson* case held (p. 231) that the Norris-La Guardia Act removed the fetters of such decisions as the *Duplex* case and said (p. 236):

> "The Norris-La Guardia Act was a disapproval of *Duplex Printing Press Co.* v. *Deering*, supra, and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Assn.*, 274 U. S. 37 as the authoritative interpretation of Section 20 of the Clayton Act, for Congress now placed its own meaning upon that section. • • • In this light Section 20 removes all such allowable conduct from the taint of being a 'violation of any law of the United States,' including the Sherman Law."

In the *Hutcheson* case, in answer to the reliance placed by the United States upon such cases as the *Duplex* case,

the *Pratt* case, and the first *American Medical Ass'n* case, this Court said (p. 236):

> "There is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by the Norris-La Guardia Act on the nature of the industrial conflict. And since the facts in the indictment are made lawful by the Clayton Act in so far as 'any law of the United States' is concerned, it would be idle to consider the Sherman Law apart from the Clayton Act as interpreted by Congress. Cf. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469."

This Court further said (p. 232):

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Sec. 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

It cannot be said that the Clayton and Norris-La Guardia Acts apply or were intended to apply only to labor unions and their activities, because the case of *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, has settled that contention. In that case the defendants charged with a violation of the Sherman Act were not labor unions. On the contrary, the New Negro Alliance was a corporation composed of colored persons, organized for the mutual improvement of its members and the promotion of civic, educational, benevolent, and charitable enterprises. Some of the defendants were officers of New Negro Allianee, a corporation. The relationship of employer and employee did not exist between the New Negro Alliance, its officers, and the Sanitary Grocery Co., which the Alliance and its officers undertook to picket and boycott, accompanied with

the circulation and publication of black lists, intimidation, coercion, and disorderly conduct. This Court held that the Norris-La Guardia Act applied to and protected the New Negro Alliance and its officers. In *United States* v. *American Federation of Musicians*, supra, it was held that musicians and their national association were within the Acts, and that the Sherman Act did not apply to them.

To the same effect as the *Hutcheson* case are *United States* v. *Carrozzo*, 37 F. Sup. 191, affirmed 313 U. S. 508, and *Drivers Union* v. *Lake Valley Co.*, 311 U. S. 91, and see *A. F. of L.* v. *Swing*, 312 U. S. 321, 326.

The result of those cases is, that if petitioners and their members were engaged in the same industry, trade craft, or occupation as GHA, its members, its doctors, other Washington doctors and the Washington hospitals, or had direct or indirect interests therein, and were engaged in a dispute or controversy concerning terms or conditions of employment or concerning associations or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms and conditions of employment, their activities would not violate the Sherman Act.

Petitioners insist that the evidence clearly discloses that the parties alleged to have been restrained and petitioners were engaged in a "dispute" as defined by the Clayton and Norris-La Guardia Acts. Indeed, the indictment alleged and the Government insisted that the acts of the defendants were all done in the selfish, self-interest of the defendants themselves, and that the controversy covered by the indictment was between rival methods of rendering medical services. The United States in its brief in the court below conceded (p. 25): "Thus it appears that this case is the outgrowth of conflict between rival systems for the distribution of medical care."

Bodies of men organized and associated together for the purpose of engaging, or who are engaged, in some legitimate

and lawful enterprise, may adopt and enforce such reasonable rules and regulations as may be needed to promote harmony between the members and advance the best interests of the enterprise or business in which they are engaged, although the effect of such rules and regulations may be to limit the freedom of action that the members might enjoy if they were not connected with the association, and the further effect may be to injure the business of some other party.[23]

If the bodies of men so organized and associated together become engaged in a controversy or dispute with persons who are engaged in the same industry, trade, craft, or occupation, or who have direct or indirect interests therein, about rules or regulations or about any other matter or thing concerning terms or conditions of employment, or concerning association or representation of persons in

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[23] *Levering & G. Co.* v. *Morrin*, 289 U. S. 103; *Anderson* v. *United States*, 171 U. S. 604; *Barker Painting Co.* v. *Brotherhood of Painters, etc.*, 57 App. D. C. 322, 23 F. 2d 743 (Cert. den. 276 U. S. 631); *Bryant* v. *District of Columbia Dental Society*, 26 App. D. C. 461; *United States* v. *Metropolitan Club*, 11 App. D. C. 180; *Edelstein* v. *Gillmore*, 35 F. 2d 723; *Rockwood Corp.* v. *Bricklayers' Local Union*, 33 F. 2d 25; *International Organization, etc.* v. *Red Jacket, C. C. & C. Co.*, 18 F. 2d 839; *Hart* v. *B. F. Keith Vaudeville Exch.*, 12 F. 2d 341; *Tilbury* v. *Oregon Stevedoring Co.*, 8 F. 2d 898; *United States* v. *Fur Dressers, etc. Assn.*, 5 F. 2d 869; *Alaska S. S. Co.* v. *International Longshoremen's Assn.*, 236 F. 964; *Booker & Kinnaird* v. *Louisville Board*, 188 Ky. 771, 224 S. W. 451; *George J. Grant Const. Co.* v. *St. Paul Bldg. Trades Council*, 136 Minn. 167, 161 N. W. 520; *O'Keefe* v. *Local 463 of United Assn. of Plumbers*, 277 N. Y. 300, 14 N. E. 2d 77; *Exchange Bakery & Restaurant* v. *Rifkin*, 245 N. Y. 260, 157 N. E. 130.

These rights are applicable specifically to doctors, hospitals and medical societies:

Bryant v. *District of Columbia Medical Society*, 26 App. D. C. 461; *Newton* v. *Board of Com'rs.*, 86 Col. 446, 282 P. 1068; *Olander* v. *Johnson*, 253 Ill. App. 89; *Irwin* v. *Lorio*, 169 La. 1090, 126 So. 669; *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432; *Weyrens* v. *Scotts Bluff County Medical Society*, 133 Neb. 814, 277 N. W. 378; *Branagan* v. *Bookman*, 122 N. Y. S. 610, aff. 130 N. Y. S. 1106; *Strauss* v. *Marlboro County General Hospital*, 185 S. C. 425, 194 S. E. 65; *Harris* v. *Thomas*, 217 S. W. 1068 (Tex. Civ. App.); *Porter* v. *King County Medical Society*, 186 Wash. 419, 58 P. 2d 367.

negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee, the Clayton and Norris-La Guardia Acts operate to lift them bodily out of the Sherman Act.

The conference between a special committee of the executive committee of the Medical Society of the District of Columbia and Mr. Penniman, president of GHA, Dr. Brown, medical director of GHA, and Mr. Zimmerman on June 24, 1937 (R. 290) and the conference between a special committee of the executive committee of DMS and the board of trustees and medical director of GHA on July 26, 1937 (R. 176-197), and much of the other evidence in the record clearly and plainly show that petitioners became engaged in a controversy or dispute with persons who were engaged in the same occupation, or who had direct or indirect interests therein, concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, and therefore petitioners were entitled to the protection of the Clayton and Norris-La Guardia Acts and were not within the Sherman Act.

From the indictment and the record it is clear that petitioners were engaged in a "dispute" with others in the same occupation within the meaning of the Clayton and Norris-La Guardia Acts, and consequently they were not within nor subject to Sec. 3 of the Sherman Act.

Certainly, under the evidence, petitioners' sixty-fifth instruction (R. 1493) correctly charged the law applicable. It charged that if the jury found a dispute or controversy over employment existed between GHA and all others involved, including petitioners and the Washington hospitals, and *all* involved were directly or indirectly interested in

the same trade or occupation, and further found the defendants acted in self-interest peacefully and without violence then they should have been acquitted. It was reversible error to deny this instruction as it was not covered in the charge.

Respondent necessarily contends that no dispute concerning terms or conditions of employment is involved in this case in which petitioners were even indirectly interested. Petitioners insist otherwise. There are many instances to so show.[24] The situation is exactly the same as if

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[24] 1. The constitution of DMS required its members to submit to the proper Committees of DMS any contract of employment which they might enter into with an employer (R. 1265, 1266). GHA and its doctors declined to submit the contract of employment of GHA doctors by GHA (R. 173). This violation of the constitution was one of the charges against Dr. Scandiffio and one of the reasons for his expulsion from DMS (R. 1272).

2. The question whether doctors should work for a monthly salary for an organization which sold their services to the public or whether such an organization should pay the doctors on a fee-for-service basis was also involved (R. 179, 304).

3. The question whether GHA, a corporation, was violating federal statutes and unlawfully practicing medicine or insurance and consequently whether the doctors in the employee relationship to GHA would be violating the law (R. 180, 187).

4. The principles of medical ethics forbade a doctor to solicit patients or advertise for them, and there was a question whether these principles could be evaded if GHA, the doctors' employer, did the advertising and soliciting. There was also involved in this point coercing the Government employees to join GHA, the doctors' employer (R. 179, 180).

5. The question whether GHA by virtue of its right to employ and discharge a doctor and in other respects dominated and directed the quality and extent of medical services rendered by doctor employees of GHA to the patients of GHA, in violation of the employment rules of DMS (R. 303).

6. The question of the sale of medical services by GHA to HOLC and how it affected the terms and conditions of employment of other doctors in the District (R. 184, 186, 196).

7. The question of the subsidies to GHA and whether they affected the terms and conditions of employment of other doctors in the vicinity (R. 295, 300-302).

8. The question whether the kind and quality of medical services rendered by GHA brought the doctors generally, and hence the members of peti-

a corporation, a carpenter contractor, sought to employ union carpenters on a monthly salary instead of paying them the hourly rate required by the union. Does anyone suppose that under such circumstances a dispute between the carpenter contractor and the carpenter union, would not be one concerning terms and conditions of employment?

Many statements in respondent's brief in the second *American Medical Ass'n* case show that there was a dispute or controversy concerning terms or conditions of employment in which the petitioners had, at least, an indirect interest.[25]

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tioners, into disrepute, and thereby affected the terms and conditions of the employment of petitioners' members in the vicinity (R. 179, 182, 189).

9. At the conference of July 26, 1937, between a sub-committee of the Executive Committee of DMS and the trustees of GHA, the doctor members of said subcommittee, while they complained of a corporation practicing medicine (R. 178), also asked whether GHA could not continue to collect monthly dues from its members and employ the doctor members of DMS to render medical services to GHA members (R. 181, 185, 304), but as respondent said in its brief in the second *American Medical Association* case (p. 22): "GHA, desiring to obtain the advantages of group practice, was not receptive to the suggestion."

10. The question of whether GHA's plan of employment did not disrupt free competition, free choice of physicians, and tend to destroy the private practice of medicine (R. 195).

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[25] 1. Respondent stated (B. 3) GHA was engaged in rendering medical care and interested in employing qualified doctors.

2. Respondent stated (B. 3, 4) a controversy arose over the refusal of members of DMS to serve (be employed on) on GHA's staff or consult (work) with GHA's employee-doctors.

3. Respondent stated (B. 7) that petitioners have principles and rules concerning compensation, practice in a community, reasonable competition and medical care on a salary basis.

4. Respondent stated (B. 18, 19, 22) GHA was "hiring • • • salaried full time physicians," a fact known to petitioners "in violation of (petitioners') Principles of Medical Ethics," and sought to hire members of DMS; that a subcommittee of the Executive Committee of DMS suggested a basis under which GHA "would use the members of the Society to provide medical care of GHA members"; that GHA was "not receptive to the suggestion" and that GHA knew the members of DMS "were forbidden by the constitution • • • *from accepting employment or consulting*

We therefore submit that the word "trade" in Sec. 3 of the Sherman Act does not include the practice of medicine and the rendering of medical services as described in the indictment, because they are not "commercial" in nature; and even if such activities are "trade", they were not "restrained" because prices of such activities were not fixed or competition in such activities was not suppressed to the extent that market prices thereof were substantially affected to the injury of the public; and even if such activities were "trade" and were "restrained" any such restraints grew out of a dispute concerning terms and conditions of employment of doctors, which was within the Clayton and Norris-La Guardia Acts, and in which petitioners were interested and therefore this case is not within the Sherman Act.

The attempt should never have been made to stretch an old statute (the Sherman Act) to new uses, to which it is not adapted, and for which it was not intended. *United States* v. *Gradwell*, 243 U. S. 476, 489; *Fasulo* v. *United States*, 272 U. S. 620, 628, 629. In the *Apex* case (p. 513) this Court pointed out that the remedy for alleged wrongs existing outside the proper purview of the Sherman Act must be found in other applicable statutes and laws.

(working) with the members of its staff unless GHA was approved by the Society."

5. Respondent stated (B. 27) that GHA's action in refusing to employ members of DMS in conformity with the rules and regulations of DMS (terms and conditions of employing doctors) brought GHA in "automatic" conflict with the constitution and regulations of DMS.

6. Respondent's statements (B. 28-31) concern a dispute pertaining to the employment of doctors and the rendition of medical care to GHA members.

7. Respondent agrees (B. 69) that the record discloses a controversy between petitioners and the GHA doctors concerning terms and conditions of their employment, but argues that this controversy was but an element of and subsidiary to petitioners' controversy with GHA.

Conclusion.

It is respectfully submitted that the judgments below should be reversed.

EDWARD M. BURKE,
WILLIAM E. LEAHY,
SETH W. RICHARDSON,
CHARLES S. BAKER,
WARREN E. MAGEE,
Attorneys for Petitioners.

APPENDIX.

Sec. 3 of the Sherman Act of July 2, 1890, c. 647 (26 Stat. 209), 15 U. S. C. Sec. 3, reads in part:

"Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * * of the District of Columbia, or in restraint of trade or commerce between * * * the District of Columbia and any state or states or foreign nations, is declared illegal."

Sec. 1 of the Clayton Act of October 15, 1914, c. 323 (38 Stat. 730), 29 U. S. C. 53, reads:

"The word 'person' or 'persons' wherever used in section 52 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Sec. 6 of the Clayton Act of October 15, 1914, c. 323 (38 Stat. 731), 15 U. S. C. 17, reads in part:

"The labor of a human being is not a commodity or article of commerce."

Sec. 20 of the Clayton Act of October 15, 1914, c. 323 (38 Stat. 738), 29 U. S. C. 52, reads:

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particu-

larity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

Sec. 4 of the Norris-La Guardia Act of March 23, 1932, c. 90 (47 Stat. 70), 29 U. S. C. 104, reads:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interest in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

Sec. 5 of the Norris-LaGuardia Act of March 23, 1932, c. 90 (47 Stat. 71), 29 U. S. C. 105, reads:

"No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title."

Sec. 6 of the Norris-LaGuardia Act of March 23, 1932, c. 90 (47 Stat. 71), 29 U. S. C. 106, reads:

"No officer or member of any association or organization, and no association or organization participating or

interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Sec. 8 of the Norris-LaGuardia Act of March 23, 1932, c. 90 (47 Stat. 72), 29 U. S. C. 108, reads:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Sec. 13 of the Norris-LaGuardia Act of March 23, 1932, c. 90 (47 Stat. 73), 29 U. S. C. 113, reads:

"When used in sections 101-115 of this title, and for the purposes of such sections—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or association of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is

sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."